



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 29, 1998

Ms. Ann G. Dillon
Legal Counsel
General Services Commission
P.O. Box 13047
Austin, Texas 78711-3047

OR98-1560

Dear Ms. Dillon:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 116741.

The General Services Commission (the "commission") received a request for "Corporate Travel Card RFP #3-0596-CC4 and responses." In response to the request, you submit to this office for review the information which you assert is responsive. You explain that "[w]ithout taking a position, the commission requests a decision as to whether the responses to the RFP" may be proprietary in nature and protected from disclosure by section 552.110 of the Government Code.¹ We have considered the exception you claim and have reviewed the documents at issue.

Since the property and privacy rights of third parties may be implicated by the release of the requested information, this office notified American Express Corporate Services ("American Express") and First USA Financial Services ("First USA") about the request for information. See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Open Records Act in certain circumstances). The notification states that if the company does not respond within 14 days of receipt, this office will assume that the company has no privacy or property interest in the requested information. Neither American Express nor First USA responded to our notification. Therefore, we have no basis to conclude the information about these two companies is excepted from required public disclosure. However, among the information submitted by American Express, we found a

¹We assume that the requestor has been provided a copy of the actual RFP at issue, since an exception has not been claimed.

title page to their proposal, wherein a "Restriction from Disclosure" statement contends that the "proposal contains privileged or confidential trade secrets, and commercial or financial information that is exempt from disclosure under the exceptions" to the act.² As you have raised section 552.110 on the companies' behalf, we will consider whether any of the information at issue is excepted from disclosure under section 552.110.

Section 552.110 protects the property interests of private persons by excepting from disclosure two categories of information: (1) "[a] trade secret" and (2) "commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." This office cannot conclude that information is a trade secret unless the governmental body or company has provided evidence of the factors necessary to establish a trade secret claim. Open Records Decision No. 402 (1983). Facts sufficient to show the applicability of these factors have not been provided by either company. See Open Records Decision No. 363 (1983) (third-party duty to establish how and why exception protects particular information). Therefore, the requested information, concerning American Express and First USA, is not excepted from disclosure under the trade secret prong of section 552.110.

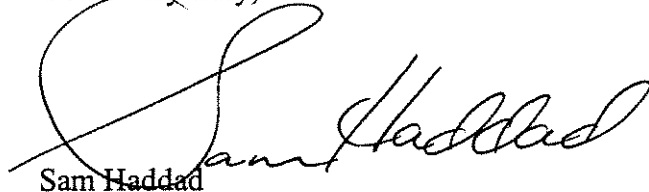
We next consider whether the information at issue constitutes "commercial or financial information." Commercial or financial information is excepted from disclosure under the second prong of section 552.110. In applying the "commercial or financial information" branch of section 552.110, this office now follows the test for applying the correlative exemption in the Freedom of Information Act, 5 U.S.C. § 552(b)(4). See Open Records Decision No. 639 (1996). That test states that commercial or financial information is confidential if disclosure of the information is likely either (1) to impair the government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained. See *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

"To prove substantial competitive harm, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure." *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), cert. denied, 471 U.S. 1137 (1985) (footnotes omitted). Neither the commission nor the companies, whose proprietary interests are implicated by this request, have established that releasing the requested information would likely cause either company to suffer substantial competitive injury. Therefore, we conclude that the requested information, concerning American Express and First USA, is not excepted from disclosure pursuant to section 552.110, and must be released to the requestor.

²We note that information is not confidential under the Open Records Act simply because the party submitting it to a governmental body anticipates or requests that it be kept confidential. Open Records Decision No. 479 (1987).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read "Sam Haddad", written over a large, stylized circular flourish.

Sam Haddad
Assistant Attorney General
Open Records Division

SH/mjc

Ref: ID# 116741

Enclosures: Submitted documents

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